SUPREME COURT, U.S.

JUN 2

IN THE

Supreme Court of the United States

October Term, 1947

No. 1448

SANFORD A. SCHAFFTZ,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

CARL A. HATCH

INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 3
STATUTES INVOLVED 3
STATEMENT 4
REASONS FOR GRANTING WRIT 5
APPENDIX ..... 1(a)

CITATIONS

CASES:

Bailey v. Richards, 182 F.2d 46, aff'd, 341 U.S. 918 17

Lorain Community Broadcasting Co., et al., 5 FCC 2d 55 13

Lorain Journal Co., et al. v. FCC, 122 US App. DC 127, 351 F.2d 824, 5 RR 2d 2111 (1965); Pet. for rehear. den., 348 U.S. 947 (May 16, 1966); Pet. to set aside Order, reopen record, and enlarge or change the issues den. July 27, 1966, WWIZ, Inc. v. FCC, US App. DC 20398 13

Public Service Television Inc. v. FCC, 115 U.S. App. D.C. 200, 317 F.2d 900, 24 RR 2064 (1962) 12, 14, 16, 17

Sanders v. U.S., 309 U.S. 470 10

Schafitz v. FCC, No. 20,721, App. D.C. 1

Stahlman v. FCC, 126 F.2d 124 10

U.S. v. Lovett, 328 U.S. 303 17

WWIZ, Inc., et al., 36 FCC 561, R.R. 2d 169; recon. den., 37 FCC 685, 3 R.R. 2d 315 aff'd. sub nom. 4, 13

IN THE

Supreme Court of the United States

October Term, 1966

No.

SANFORD A. SCHAFITZ,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sanford A. Schafitz, petitioner herein, by his attorney, Carl L. Shipley, respectfully requests that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *Schafitz,* Appellant v. *Federal Communications Commission,* Appellee, No. 20,721, U.S. Court of Appeals for the District of Columbia Circuit, Order filed March 9, 1967, and set out *infra* in the appendix hereto at page 1A.

JURISDICTION

Petitioner relies upon 28 U.S. Code 1254 and Rule 19 of this Court's Rules as the basis for jurisdiction on writ of certiorari, and alleges that the considerations governing review and certiorari involve an important question of federal law which has not been, but should be, settled by this Court, as expressed in the questions set forth hereinbelow.

QUESTIONS PRESENTED

1. In its March 9, 1967 Order granting respondent's Motion to Affirm the Federal Communications Commission Order appealed from by petitioner herein, did the court below deprive petitioner of his right to complete judicial review as provided in 47 U.S. Code 402 and 5 U.S. Code 1009 (e)?

2. Did the court below deny petitioner his constitutional right of due process of law in disposing of his appeal on motion rather than on the merits after oral argument and submission of a brief?

3. Did the court below err in affirming the Federal Communications Commission's action in refusing to accept petitioner's application for a new broadcast station construction permit without affording to him a hearing as required by 47 U.S. Code 309?

4. Did the court below err in affirming the Order of the Federal Communications Commission refusing to accept the application of petitioner herein for a construction permit for a new standard broadcast station on grounds it was repetitious within the meaning of the Commission's regulation (47 CFR 1.519(a)), without affording petitioner a hearing in accordance with the Administrative Procedure Act?

5. Did the Court below in affirming the Federal Communications Commission's Order refusing to accept petitioner's application for a construction permit for a new standard broadcast station as outlined in the preceding questions hereinabove result in a denial of due process?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1:

"All legislative powers herein granted shall be vested in a Congress. . .".

Amendment V:

". . . No person shall be deprived of life, liberty or property without due process of law; . . .".

STATUTES INVOLVED

47 U.S. Code 402:

"(b) Appeals may be taken from decisions and order of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: . . . (6) by any other person who is aggrieved or whose interests are adversely affected by any Order of the Commission. . . (f) the record and briefs upon which any such appeal shall be heard and determined by the Court shall contain such information and material, and it shall be prepared within such time and in such manner as the Court may by rule prescribe. . . (g) At the earliest convenient time the Court shall hear and determine the appeal upon the record before it in the manner prescribed by Section 1009 (e) of Title 5."

5 U.S. Code 1009 (a):

"Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. . . . (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. . . . In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party. . . ."

REGULATION

47 CFR 1.519 (a):

> "Where the Commission has denied an application for a new station or for any modification of services or facilities, or dismissed such application with prejudice, no like application involving service of the same kind to substantially the same area by substantially the same applicant, or his successor or assignee, or on behalf or for the benefit of the original parties in interest may be filed within twelve months from the effective date of the Commission's action".

STATEMENT OF CASE

In response to an Order of the FCC dated May 19, 1966 (FCC 66-44) published in 31 Fed. Reg. 7533 on May 25, 1966, Sanford A. Schafitz timely filed an FCC Form 301 Application for a Construction Permit for authorization to operate a standard broadcast station on 1380 kc, 500 watts power, daytime only, at Lorain, Ohio, that being the operating characteristics specified in the then outstanding authorization held by WWIZ, Inc., which was required by the FCC to cease operation (*WWIZ, Inc.*, 36 FCC 561, 2 R.R.2d 169; *recon. den.*, 37 FCC 685, 3 R.R.2d 315).

On September 21, 1966, the FCC in an Order (FCC 66-837) returned petitioner's application and dismissed his petition for interim authority, also pending, as moot, on the theory that said individual application was substantially the same as the corporate application for renewal of license filed by WWIZ, Inc. in 1961, and was therefore repetitious within the meaning of the Commission's Rule 1.519 (a).

Thereafter on October 5, 1966 the FCC released its Order (FCC 66-839) designating for comparative hearing the applications of Lorain Community Broadcasting Company (Docket No. 16876), Allied Broadcasting, Inc. (Docket No. 16877), and Midwest Broadcasting Company (Docket No. 16878), all of whom had filed timely applications for the same facilities as those applied for by petitioner, all of said applications

having been filed in response to the FCC's above referred to request for same of May 19, 1966 (FCC 66-44).

On October 14, 1966 petitioner filed with the FCC a petition to reconsider its September 21, 1966 Order returning his application and dismissing his request for interim authority (FCC 66-837), and also requested that the FCC's hearing on the applications for WWIZ, Inc.'s facilities, then set for November 7, 1966, be postponed pending adjudication of his right to have his application accepted and designated for hearing along with other competing applications. On January 10, 1967 the Commission denied petitioner's petition for reconsideration.

On January 24, 1967, petitioner filed a Notice of Appeal from the said FCC Order in the United States Court of Appeals for the District of Columbia Circuit, Case No. 20,721. Thereafter on February 3, 1967, the FCC filed a "Motion to Affirm", and requested the Court to affirm the Commission's Order which petitioner herein had appealed from. On February 10, 1967, petitioner filed an opposition to the FCC Motion to Affirm on grounds that granting of same would deprive him of his right to the judicial review of the Commission's Order contemplated by 47 U.S. Code 402. On March 9, 1967, the U.S. Court of Appeals for the District of Columbia Circuit granted the Federal Communications Commission's Motion to Affirm and affirmed the Order of the Federal Communications Commission, which was on appeal. This petition for a writ of certiorari is to review that said action of the Court below.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF A WRIT

In disposing of petitioner's appeal on the FCC's Motion to Affirm, the Court below denied to petitioner his statutory right to complete judicial review as provided in 47 U.S. Code 402. Congress has given to aggrieved persons whose interests are adversely affected by Orders of the Federal Communica-

tions Commission a right to appeal to the U.S. Court of Appeals for the District of Columbia Circuit. (47 U.S. Code 402(b)).

Section 402(f) provides in terms that the judicial review shall be based upon "The records and briefs", and Section 402(g) provides that: "The Court shall hear and determine the appeal upon the record before it", and further provides that the appeal upon the record shall be heard and determined:

> "In the manner prescribed by Section 1.009(e) of Title 5".

A close reading of 5 U.S.C. 1009(e) in pertinent part indicates that the scope of review must meet a certain statutory standard, i.e.,

> "So far as necessary to decision and where presented the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. . . . In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party. . .".

In granting respondents Motion to Affirm, the Court below gave petitioner only a partial judicial review.

Petitioner herein respectfully submits also that 5 U.S.C. 1009(a), like subparagraph (e), contemplates a complete judicial review involving an opportunity to file a brief, joint appendix, adequate record, and present oral argument, as well as having the opportunity to petition for rehearing *en banc* and follow all of the other procedures inherent in judicial review. Petitioner alleges and verily believes that it is a denial of due process for the court below to deny to petitioner an opportunity for complete judicial review by disposing of his appeal on the government's motion to affirm the Order appealed from.

The circumstances underlying the action of the Federal Communications Commission in this matter can best be

evaluated by reading petitioner's request for reconsideration, which is set forth in terms as follows:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-837
88340

In re Applications of

Lorain Community Broadcasting Company,
Lorain, Ohio

Requests: 1380kc, 500 w, Day

File No.
BP-16940

Sanford A. Schafitz
Lorain, Ohio

Requests: 1380kc, 500 w, Day

For Construction Permits

Request for Reconsideration of Commission Order Returning the Application of Sanford A. Schafitz and Request for Postponement of October 18, 1966 Pre-hearing Conference and November 7, 1966 Hearing on Applications for Facilities of WWIZ, Inc.

In an Opinion and Order (FCC 66-837) dated September 21, 1966 and released on September 28, 1966, the Commission (1) returned the application of Sanford A. Schafitz for a construction permit for the facilities presently authorized for use by WWIZ, Inc., at Lorain, Ohio; and (2) dismissed his petition for interim authority to operate said facilities as moot. Sanford A. Schafitz herewith respectfully requests the Commission to reconsider its said Order and to postpone the October 18, 1966 prehearing conference and the November 7, 1966 hearing set in its Order of September 26, 1966 (FCC 66 M - 1341), and released on October 5, 1966, for the following reasons:

1. The Commission states in its Order (FCC 66-837) that it is dismissing the Schafitz petition under Section 1.519(a) of the Commission's Rules (47 CFR 1.519), based upon the following conclusion:

> "While Section 1.519(a) of the Rules speaks in terms of an application for a new station or for any modification of service or facilities in precluding the filing of repetitious applications, it is the Commission's view that the same salutary principle – conducive to orderly administrative procedure – should apply equally in the case where an application for a renewal of license has been denied after a full hearing. This is particularly true where – as here – the activities of Schafitz and his associates in connection with the operation of WWIZ constituted a clear breach of Schafitz's duties and responsibilities to the Commission . . . Schafitz's application for construction permit can only serve as a vehicle for relitigating matters previously decided by the Commission".

2. In Section 1.519(a) of the Commission's Rule provides, in part:

> "Where the Commission has denied an application for a new station or for any modification of services or facilities, or dismissed such application with prejudice, no like application involving service of the same kind to substantially the same area by substantially the same applicant, or his successor or assignee, or on behalf or for the benefit of the original parties in interest may be filed within 12 months from the effective date of the Commission's action".

3. Petitioner respectfully submits that WWIZ, Inc., whose renewal application was denied, is an entirely separate and distinct corporate and legal entity governed under the laws of the State of its incorporation by a board of directors involving a number of persons. Whatever the merits or ultimate outcome of the Commission's action respecting WWIZ, Inc. (which is still *sub judice* in the U.S. Court of Appeals, Case No. 20,398), Sanford A. Schafitz cannot be denied his rights under the

Administrative Procedure Act, the Communications Act of 1934, and the due process provisions of the Federal Constitution on the basis of guilt by association to apply for the facilities of WWIZ, Inc. along with other applicants in response to the Commission's Order (FCC 66-441), dated May 19, 1966, and published on May 25, 1966 in Volume 31, Federal Register, at page 7533. The Commission can and must take administrative notice of the fact that in Docket No. 14539, File No. BR-3014, the Commission has found Mr. Schafitz individually to be qualified to operate Standard Broadcast Station WFAR, Farrell, Pennsylvania, in his individual capacity. The Commission is estopped from refusing to accept Mr. Schafitz's application as an individual for the facilities of WWIZ, Inc., or refusing to permit him to participate in a comparative hearing with other applicants for said facilities.

4. In any event, petitioner is entitled to a hearing and an opportunity to show by substantial evidence that his application meets the requirements of the rules and the statute before the Commission takes any action to return same, and the Commission's action must be supported by substantial evidence, which petitioner respectfully submits is not the case in the present situation, and that, therefore, the Commission's action is arbitrary, capricious and unlawful and a violation of due process. Under the Administrative Procedure Act (5 USCA 1001) "license" is defined to include the whole or part of any agency permit, and "licensing" includes every agency process respecting the granting of a permit. Under the same statute (5 USCA 1008), the Commission is prohibited from returning petitioner's application for a construction permit without first giving petitioner an opportunity "to demonstrate or achieve compliance with all lawful requirements".

5. Any reasonable rating of Section 1.519(a) of the Commission's Rules indicates it is limited to repetitious applications by a party or his successor or assignee. By its terms it does not apply to license renewal actions, and cannot be stretched and tortured into a bar to the right of petitioner as an individual to apply for a construction permit covering the facilities of WWIZ, Inc.

Not only does said rule not apply to license renewal applications as distinguished from "an application for a new station or for any modification of service or facilities or dismissed (dismissal of) such application with prejudice", in the words of the rule, but it applies only to "substantially the same applicant". The Commission's reasoning in its Order returning Mr. Schafitz's application is clearly erroneous because neither his application nor his identity come within the purpose or the words of the cited rule.

6. Petitioner respectfully requests the Commission to postpone the October 18, 1966 prehearing conference in Docket No. 16876, 16877 and 16878, as well as the November 7, 1966 hearing date, pending final adjudication of his right to have his application as an individual accepted and designated for hearing along with the applications of other interested parties. Unless the Commission takes such action to postpone the hearing, petitioner's rights will be defeated and mooted and he will be deprived of substantial rights without due process.

7. In view of the above circumstances, petitioner respectfully submits that the Commission should reconsider its above referred to Order and accept his application for filing and designate it for hearing along with the applications of other persons seeking the facilities of WWIZ, Inc. At such hearing other parties or the Commission itself can determine the qualifications of petitioner under the statute. As stated in *Stahlman v. FCC*, 126 F.2d 124,

> "The Communications Act requires no more of an applicant for a radio license than proof of citizenship, character, and financial and technical qualifications to operate in the public interest."
>
> "Possessing these, the applicant's eligibility is unchallengeable . . . This is the rule announced by the Supreme Court in the *Sanders* case (309 U.S. 470) . . . The determination of these qualifications is an administrative function which Congress has committed to the Commission, subject only to the requirement . . . it shall act as the public

convenience and necessity requires . . . This . . . is not a grant of unlimited power. . . ".

Unless the Commission accepts petitioner's application and designates it for hearing, it will have in effect prejudged his qualifications as an applicant in his individual capacity on the basis of the proceedings in the license renewal application of WWIZ, Inc., a corporate entity with a multi-member board of directors, whose qualifications for a license renewal were adjudicated on narrow technical issues involving *de jure* and *de facto* transfer of control as distinguished from the basic issues always involved in a construction permit application. Such action by the Commission can only be characterized as arbitrary and capricious and a denial of petitioner's statutory and constitutional right to procedural due process as outlined hereinabove.

Respectfully submitted,

Sanford A. Schafitz

/s/ Carl L. Shipley
His Attorney

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed, postage prepaid, this 14th day of October, 1966, copies of the foregoing Request for Reconsideration of Commission Order Returning the Application of Sanford A. Schafitz and Request for Postponement of October 18, 1966 Prehearing Conference and November 7, 1966 Hearing on Applications for Facilities of WWIZ, INC., to the following:

John B. Letterman, Esq.
Chief, Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Robert A. Marmet, Esq. and
Edwin R. Schneider, Jr., Esq.
Marmet & Schneider
1822 Jefferson Place, N.W.
Washington, D.C. 20036
Counsel for
Lorain Community Broadcast
Company

/s/ Carl L. Shipley
Attorney for
Sanford A. Schafitz

The action of the Federal Communications Commission on said Request for Reconsideration is equally revealing in that it concludes that petitioner's request was "repetitious" within the meaning Section 1.519(a) of the Commission's Rules, and relies upon *Public Service Television, Inc. v. Federal Communications Commission*, 115 U.S. App. D.C. 200, 317 F.2d 900, as the legal basis for that determination. The Commission's Order is set forth in full as follows:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 67-25
92644

In re Application of

SANFORD A. SCHAFITZ
Lorain, Ohio

Requests: 1380kc, 500w, Day

For Construction Permit

ORDER

By the Commission: Commissioner Wadsworth absent; Commissioner Johnson not participating.

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 5th day of January, 1967;

1. The Commission has before it a "Request for Reconsideration of Commission Order Returning the Application of Sanford A. Schafitz and Request for Postponement of October 18, 1966, Prehearing Conference and November 7, 1966, Hearing on Applications for Facilities of WWIZ, Inc.," filed October 17, 1966.

2. The request for reconsideration of the return of the application is directed against the Commission's action of September 21, 1966 (Memorandum Opinion and Order released September 28, 1966, *Lorain Community Broadcasting Co., et al.*, 5 FCC 2d 55) insofar as it ordered the return of Schafitz's application as unacceptable pursuant to Section 1.519(a) of the Commission's Rules, the provisions of which bar acceptance of a repetitious application. The dates for a prehearing conference and a hearing were set by order of September 26, 1966, of the Commission's Chief Hearing Examiner (FCC 66M-1341) in a proceeding on three applications (*Lorain Community Broadcasting Company, et al.*, Docket Nos. 16876, *et al.*) for authority to continue a standard broadcast service in Lorain, Ohio, now provided by Station WWIZ. An application for renewal of the license of WWIZ was denied,[1] and the effective date of the

[1] *WWIZ, Inc., et al.*, 36 FCC 561, 2 RR 2d 169; reconsideration denied, 37 FCC 685, 3 RR 2d 315; affirmed *sub nom. Lorain Journal Co., et al. v. Federal Communications Commission*, 122 U.S. App. D.C. 127, 351 F.2d 824, 5 RR 2d 2111 (1965); petition for rehearing *en banc* denied November 19, 1965; certiorari denied April 4, 1966, *WWIZ, Inc. et al. v. Federal Communications Commission, et al.*, 383 U.S. 967; petition for rehearing denied, 384 U.S. 947 (May 16, 1966); petition to set aside order, reopen record, and enlarge or change the issues denied July 27, 1966, *WWIZ, Inc.*, 4 FCC 2d 608, 8 RR 2d 177; appeal pending, *WWIZ, Inc. v. Federal Communications Commission*, United States Court of Appeals for the District of Columbia Circuit, Case No. 20,398.

Commission's decision has been postponed until thirty days following the release either of a Commission order authorizing interim operation of the facility, or of a Commission order directing that operation by WWIZ, Inc., be terminated, or of an order in the pending consolidated proceeding (*Lorain Community Broadcasting Company, supra*) granting authority to one of the competing applicants for operation of the station on a regular basis becomes final, whichever occurs first.

3. Schafitz's request, insofar as it seeks postponement of the prehearing conference and hearing date in the Lorain proceeding, does not comply with Section 1.209 of the Commission's Rules in that the caption does not indicate that the request is to be acted on by the presiding officer. Moreover, the pleading does not comply with Section 1.44(a) and (b) in that requests requiring actions by the Commission and action by the Hearing Examiner are combined in one pleading. The pleading may therefore be returned pursuant to Section 1.44(d) of the Rules. The Commission will not, however, return the requests on these grounds. Instead, we will deny the request for reconsideration on other grounds, indicated herein, and will dismiss the request for postponement of the hearing as moot.[2]

4. Schafitz disputes the applicability of the Commission's procedures to his application. Other arguments urged by Schafitz are essentially those previously considered by the Commission and the courts in connection with his application and his previous efforts to overturn the Commission's denial of the WWIZ renewal. Having considered Schafitz's arguments, we find that nothing new of substance is asserted in support of his request for reconsideration. We therefore adhere to our previous holding that acceptance of Schafitz's application for the WWIZ facilities is prohibited by the Commission's Rules, *Cf. Public Service Television, Inc. v. Federal Com-*

---

[2]The prehearing conference was held as scheduled on October 18, 1966. The hearing has been continued to January 11, 1967.

munications Commission, 115 U.S. App. D.C. 200, 317 F.2d 900, 24 RR 2064 (1962).

Accordingly, IT IS ORDERED, That the request of Sanford A. Schafitz for reconsideration of the Commission's Order returning his application IS HEREBY DENIED; and that his request for postponement of hearing dates IS DISMISSED as moot.

Federal Communications Commission

Ben F. Waple
Secretary

Released: January 10, 1967

The fatal flaw in the Commission's action, and which was either condoned, approved, or overlooked by the Court below in its action affirming the Commission's Order on motion, is that petitioner herein has a statutory right under 47 U.S. Code 309(e) to a hearing before the Federal Communications Commission before concluding that his application was "repetitious". Indeed, it would be almost incomprehensible and a total distortion of the concept of due process, if the FCC can defeat, violate and ignore both the Communications Act of 1934 and the Administrative Procedure Act and in effect and in substance deny petitioner's application without a hearing by the stratagem of concluding that it was "repetitious", and assuming that the Commission has been empowered by Congress to promulgate its Rule 1.519(a) and administer it in such a way as to nullify Section 309(e) of the Communications Act. Said Section 309(e) provides in substance that if any application cannot be granted by the Commission "for any reason", the Commission:

> "shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue,"

and further provides that:

> "any hearing subsequently held upon such application shall be a *full hearing*" (emphasis supplied).

Petitioner alleges and verily believes that he is entitled to a Section 309(e) hearing by the Commission to determine whether or not his application was in fact "repetitious", particularly in view of the fact that Schafitz as an individual was the applicant and his application on its face was not a repetitious application by WWIZ, Inc., the corporate applicant involved in the lengthy proceedings referred to in the Commission's Order.

Petitioner is equally concerned with the fact that 47 CFR 1.519(a), the Commission's Rule under which his application was denied acceptance on grounds of being "repetitious", in terms applies only to applications "for a new station or for any modification of services or facilities," or to the dismissal of "such application with prejudice". Petitioner's application was for a new standard broadcast station; however, the finding that said application was repetitious is based upon the fact that a former corporate applicant, WWIZ, Inc., of which petitioner was a principal, had been earlier filed – but takes no account of the fact that the WWIZ, Inc. application was a "renewal application", and not a new station application. Even more serious, 47 CFR 1.519(a), even if it be assumed that a conclusion of repetitiousness was justified, is limited as a bar to a twelve month period, and the record clearly shows that petitioner herein filed his application which was not accepted more than a year after the WWIZ, Inc., renewal application had been filed, and Rule 1.519(a) is only a bar for one year.

Of equal importance to the rights of petitioner herein is the fact that both the Federal Communications Commission and the Court below seem to have premised their actions upon *Public Service Television, Inc. v. Federal Communications Commission,* 115 U.S. App. 200, 317 F.2d 900, which is almost totally inapposite. In the *Public Service* case the contest was for a construction permit for Channel

10 TV at Miami, Florida, where an applicant was found to have engaged in corrupt practices in attempting to influence members of the Federal Communications Commission. Within a year exactly the same entity filed another application for the same facilities, clearly in violation of 47 CFR 1.519(a), but the question of whether the applicant was entitled to a hearing on the question of "repetitiousness" was not before the Court apparently. Petitioner was personally at no time involved in any similar corrupt activities, and has been subsequently found individually to be qualified for a broadcast license for Station WFAR, Farrell, Pennsylvania, of which he is the sole owner. Apart from the question of the distinction between petitioner as an individual and the other corporate applicant (WWIZ, Inc.) giving rise to the finding of repetitiousness, the WWIZ, Inc. renewal application was denied for reasons *malum prohibitum* and not *malum in se;* in other words, a technical violation by petitioner as against corrupt activity by the applicant in the *Public Service* case. Another important question is whether the Federal Communications Commission can bar in perpetuity the application of a person on a finding of repetitiousness, in view of the holdings in *Bailey v. Richards,* 182 F.2d 46, affirmed 341 U.S. 918, and *U.S. v. Lovett,* 328 U.S. 303, where permanent proscription from a Government privilege was held to be unconstitutional. In those cases the problem was Federal employment, but the same principle would seem to apply to any Federal privilege, including a broadcast license. A permanent administrative proscription in perpetuity would seem to be in the nature of a bill of attainder, and not permissible on the part of the Federal Communications Commission as against any citizen.

WHEREFORE, the premises considered, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL L. SHIPLEY
1204 National Press Building
Washington, D.C. 2004
Counsel for Petitioner

Of Counsel:
Shipley, Akerman & Pickett
1204 National Press Building
Washington, D.C. 20004

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

No. 20,721 September Term, 1966

Sanford A. Schafitz,
Appellant,

v.

Federal Communications
Commission,
Appellee.

Before:

Danaher, Burger, and Wright,
Circuit Judges, in Chambers.

ORDER

On consideration of appellee's motion to affirm and of appellant's opposition thereto, it is

ORDERED by the court that appellee's aforesaid motion be granted and the order of the Federal Communications Commission on appeal herein is affirmed. See *Public Service Television, Inc. v. FCC,* 115 U.S. App. D.C. 200, 317 F.2d 900 (1962).

Per Curiam.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 217

SANFORD A. SCHAFITZ, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner seeks review of an order of the court of appeals (Pet. 1–A) affirming without opinion the Federal Communications Commission's refusal to accept his application for a radio station license. We submit that the Commission and the court acted correctly, that no issue of general importance is presented, and that plenary review by this Court is not warranted.

1. On March 25, 1964, the Commission denied the license renewal application of WWIZ, Inc., a corporation personally controlled by petitioner, for operation of radio station WWIZ at Lorain, Ohio; it also

268-733—67

denied petitioner's application for transfer of control of WWIZ, Inc. from himself to the Lorain Journal Company. *WWIZ, Inc.*, 36 F.C.C. 561, rehearing denied, 37 F.C.C. 685. These rulings were based on the Commission's findings, made after extensive administrative proceedings, that the activities of petitioner and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission, contrary to Section 310(b), 47 U.S.C. 310(b), of the Communications Act and by the Commission's rules, and that petitioner had breached his duties and responsibilities to the Commission by misrepresenting and withholding information from it pertaining to this transaction. The court of appeals upheld the Commission's findings and affirmed. *Lorain Journal Co.* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A. D.C.). This Court denied certiorari on April 4, 1966 (383 U.S. 967), and on May 16, 1966, denied a petition for rehearing (384 U.S. 947).

Within a few days of the final disposition of that case by this Court, the Commission, on May 19, 1966, invited applications for authority to construct and operate a station at Lorain to replace WWIZ. Among others, petitioner applied. His application was filed in his own name, not his corporation's. Noting that he had been found unqualified in the prior proceeding, the Commission, relying on its Rule 1.519(a), 47 C.F.R. 1.519(a),[1] dismissed the application on the

[1] Rule 1.519(a) prohibits an unsuccessful applicant for a new station or for any modification of services or facilities from submitting a like application involving service of the same kind

ground that it could "only serve as a vehicle for relitigating matters previously decided." *Lorain Community Broadcasting Company,* 5 F.C.C. 2d 55, 57. By a *per curiam* order entered on March 9, 1967, the court of appeals granted the Commission's motion to affirm.[2]

It is evident that by immediately filing a new application in his own name, rather than in the corporate name of his personal enterprise, petitioner was seeking to reopen the earlier proceeding which fully resolved the question of petitioner's qualification to operate a radio station in Lorain, Ohio. When an application for a radio station license in no way materially differs from an earlier application which was denied in a completed proceeding in which the applicant's qualifications were found unsatisfactory, the Commission should be permitted, in the interests of effective regulation, to dismiss the new application without the formality of full evidentiary hearings on the merits. *Public Service Television, Inc.* v. *Federal Communications Commission,* 317 F. 2d 900 (C.A. D.C.); Commission Rule 1.519(a), 47 C.F.R. 1.519(a); cf. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205. Neither Section 309(e) of the Communications Act, 47 U.S.C. 309(e), nor considerations of fair procedure, require the Commission to conduct wholly re-

---

to substantially the same area either in his own name, or that of his successor or assignee, or for the benefit of the original parties in interest, within twelve months of the effective date of the Commission's action.

[2] The procedure is similar to that prescribed by this Court's Rules 16(1)(c) for deciding appeals without oral argument.

dundant proceedings. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476.

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

JULY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967